

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3

4 UNITED STATES OF AMERICA,)

Case No. 2:16-cr-00265-GMN-CWH

5 Plaintiff,)

6 v.)

7 ALBERT LOPEZ,)

ORDER

8 Defendant.)
9

10 This matter is before the court on Defendant Albert Lopez' Motion for Production of
11 Discovery (ECF No. 527), filed February 26, 2018, the Government's Response (ECF No. 552), filed
12 March 12, 2018, and Defendant's Reply (ECF No. 559), filed March 19, 2018. Defendants Palafox,
13 Carr, Garcia, Morales, Juarez, Campos, Halgat, Perez, Henderson, Dunlap, Neddenriep, Gonzalez,
14 Davisson, Coleman, Seimer, and Gillespie move to join the motion. (ECF Nos. 528, 529, 530, 531,
15 532, 533, 534, 535, 536, 537, 538, 540, 541, 543, 545, 547).

16 Defendants' motion is a broad-ranging discovery motion seeking an order compelling
17 production of a variety of information. Lopez argues that because this is a capital case, legal
18 authority requires broad disclosure of mitigation evidence. Lopez argues that discovery is required
19 to support allegations of a due process violation before the grand jury in this case. He further argues
20 that discovery is required to allow him to challenge his detention and to prepare for trial.

21 The government responds that since the motion was filed, the Attorney General decided that
22 the United States will not be seeking the death penalty. (*See* Notice (ECF No. 551).) Accordingly,
23 any request under the pre-death penalty discovery protocol is moot. The government further
24 responds that Lopez fails to demonstrate a need for early disclosure of grand jury and Jencks
25 material, and that his other requests for discovery should be denied.

26 **I. ANALYSIS**

27 As a general proposition, there is no constitutional right to discovery in a criminal case.
28 *Weatherford v. Bursey*, 429 U.S. 545, 559 (1997). However, the government has a constitutional

1 duty to disclose exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The
2 Supreme Court has also held that the government must disclose impeachment evidence, including all
3 promises, inducements, or threats made to a witness in order to gain the cooperation of that witness
4 in the investigation or prosecution of the Defendant. *Giglio v. United States*, 405 U.S. 150, 154
5 (1972). The *Brady/Giglio* doctrine does not require the government to disclose neutral, irrelevant,
6 speculative or inculpatory evidence. *See, e.g., U.S. v. Stinson*, 647 F.3d, 1196, 1208 (9th Cir. 2011).
7 Evidence is material under *Brady* if there is a reasonable probability that, if the government had
8 disclosed the evidence to the Defendant, the result of the proceeding would have been different. *See*
9 *United States v. Bagley*, 473 U.S. 667, 681 (1985); *see also United States v. Acosta*, 357 F.Supp.2d
10 1228, 1243 (D. Nev. 2005) (materiality standard governs pretrial requests for *Brady* disclosure).
11 Although *Brady* should be interpreted broadly to encourage prosecutors to carry out their duty, it
12 does not require the government to disclose every scrap of evidence that could conceivably benefit a
13 defendant. *See, e.g. Moore v. Illinois*, 408 U.S. 786, 795 (1972) (“We know of no constitutional
14 requirement that the prosecution make a complete and detailed accounting to the defense of all police
15 investigatory work”).

16 A defendant’s allegation that the requested information might be material does not entitle
17 him or her to an unlimited or unsupervised search of the government’s files. *See Pennsylvania v.*
18 *Ritchie*, 480 U.S. 39, 59 (1987). The government alone determines which information must be
19 disclosed pursuant to *Brady*, and this decision is final. *Id.* The Supreme Court has cautioned the
20 government not to “tack too close to the wind” in determining whether material is exculpatory, and
21 therefore should be produced. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995). However, the
22 government has the responsibility to make judgment calls about what qualifies as “favorable
23 evidence” and whether certain evidence is “favorable” depends on the context of the existing or
24 potential evidentiary record. *Id.* The prosecutor is a representative of the government whose
25 interests in criminal prosecution is not “that it shall win a case, but that justice shall be done.” *Id.*
26 (Internal quotations and citations omitted). Therefore, “the prudent prosecutor will resolve doubtful
27 questions in favor of disclosure.” *Id.*

28 The Jencks Act, in order to provide for full and fair cross-examinations, requires the United

1 States to provide the defense with any statements made by a witness relating to his or her testimony
2 after that witness has testified on direct examination. 18 U.S.C. § 3500. A statement for the
3 purposes of the Jencks Act is:

4 (1) a written statement made by said witness and signed or otherwise adopted or approved by
5 him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof,
6 which is substantially verbatim recital of an oral statement made by said witness and recorded
contemporaneously with the making of such oral statement; or (3) a statement, however taken
or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

7 18 U.S.C. § 3500(e). Both the Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure,
8 which incorporates the Jencks Act, provide that *after* a witness called by the government has
9 testified, a criminal defendant, upon motion, is entitled to any prior statements made by the witness
10 that relate to the subject matter of the witness's testimony. 18 U.S.C. § 3500 (emphasis added).
11 Finally, when the defense seeks material that qualifies as both Jencks Act and Brady material, the
12 Jencks Act controls with respect to the timing of disclosure. *United States v. Alvarez*, 358 F.3d 1194,
13 1211 (9th Cir. 2004). The Court does not have the authority to compel the Government to produce
14 Jencks Act statements before a witness testifies. *See United States v. Mills*, 641 F.2d 785, 789–90
15 (9th Cir. 1981), *cert. denied*, 454 U.S. 902 (1981). An order requiring early disclosure is
16 unenforceable. *United States v. Taylor*, 802 F.2d 1108, 1118 (9th Cir. 1986), *cert. denied*, 479 U.S.
17 1094 (1987).

18 II. SPECIFIC DEMANDS

19 A. Grand Jury Materials

20 Defendant requests all grand jury materials. Because he believes that the government
21 knowingly used false testimony to obtain the indictment, Lopez alleges a possible due process
22 violation before the grand jury. Specifically, Lopez believes that the grand jury was not made aware
23 that Rudnick had altered or recanted his previous testimony from the Gonzalez trial. Accordingly, he
24 requests grand jury materials be provided in order for him to support this position. The government
25 responds that Lopez fails to demonstrate a need for early disclosure of grand jury testimony and
26 submits that it did not present knowingly perjured testimony to the grand jury and it is unaware of
27 any perjured testimony before the grand jury in this case. Lopez restates his argument in reply.

28 Rule 6(e) of the Federal Rules of Criminal Procedure codifies the traditional rule of grand

1 jury secrecy. With specified exceptions, it prohibits disclosure of “matters occurring before the
2 grand jury.” Fed. R. Crim. P. 6(e)(2). “A party seeking disclosure of the grand jury transcripts must
3 demonstrate a ‘particularized need’ for the disclosure.” *United States v. Perez*, 67 F.3d 1371, 1381
4 (9th Cir. 1995), *opinion withdrawn in part on reh'g*, 116 F.3d 840 (9th Cir. 1997) (citations omitted).
5 The standards the trial court should apply in granting disclosure of the grand jury transcripts are “(1)
6 that the desired material will avoid a possible injustice, (2) that the need for disclosure is greater than
7 the need for continued secrecy, and (3) that only the relevant parts of the transcripts should be
8 disclosed. *Id.*

9 The premise of Lopez’s argument is that Rudnick’s altered or recanted testimony was not
10 made known to the grand jury. In order to determine the validity of Lopez’s claim, the Court
11 conducted an *in camera* inspection of the grand jury proceedings, and has now determined and finds
12 that Lopez’s claim is not substantiated.¹ Because Lopez has not demonstrated a particularized need
13 for further disclosure which would outweigh the need for grand jury secrecy, the request for “all
14 grand jury transcripts and exhibits and other items presented to the grand jurors” concerning the
15 alleged murder conspiracy is denied.

16 **B. Rudnick Investigation Materials**

17 Lopez requests all reports of investigation concerning Rudnick, and reports that bear on his
18 credibility, and notes of law enforcement interviews with Rudnick. The government responds that
19 the request is premature, and that it will comply with its discovery obligations. Lopez makes no
20 argument why the principles of *Jencks*, *Brady* or *Bagley* do not apply to this request. The request is
21 denied.

22 **C. Washoe County District Attorney’s Office Materials**

23 Defendant requests all documents of interviews/debriefings between Mr. Rudnick
24 and Assistant District Attorney Karl Hall or any other law enforcement officers, including audio and
25 video recording and written reports. The government responds that all information, except
26 privileged work product, related to Rudnick provided by the Washoe County District Attorney’s

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28 ¹ This grand jury information is revealed pursuant to Fed.R.Crim.P. 6(e)(3)(E)(I), which
authorizes disclosure of grand jury information in connection with a judicial proceeding.

1 office has been produced. Lopez provided no reply to the government's response on this issue. The
2 request is denied.

3 **D. Miscellaneous Discovery Materials**

4 Defendant requests miscellaneous discovery concerning the two individuals who will testify
5 about the murder conspiracy (request #4), the alleged Bradley Campos beating (request #5),
6 discovery related to the attempted motorcycle robbery (request #6), discovery concerning the 2013
7 assault of a civilian (request #7), discovery related to the "hit" on the informant and undercover
8 officer (request #9), and discovery related to the "hit" against a former Vagos OMG member who
9 joined the Mongols OMG (request #10). The government responds that the request is premature, and
10 that it will comply with its discovery obligations. Lopez makes no argument why the principles of
11 Jencks, *Brady* or *Bagley* do not apply to these requests. The requests are denied.

12 **E. Informant and Undercover Officer Materials**

13 Defendant requests discovery concerning an informant and undercover officer (included in
14 request #7). The government responds that the request is premature, and that it will comply with its
15 discovery obligations. Lopez makes no argument why the principles of Jencks, *Brady* or *Bagley* do
16 not apply to this request. The request is denied.

17 **F. Bomb Threat Materials**

18 Defendant requests information related to the bomb threat the United States referenced
19 during his detention hearing (request #8). The government responds that although that information
20 falls outside the government's Rule 16 obligations because it is not charged in the indictment and
21 will not be used in the government's case and chief, it has provided information regarding the bomb
22 threat. The request is denied.

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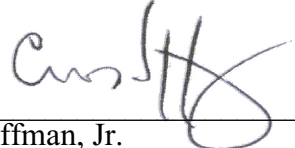
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1 IT IS THEREFORE ORDERED that Defendants Palafox, Carr, Garcia, Morales, Juarez,
2 Campos, Halgat, Perez, Henderson, Dunlap, Neddenriep, Gonzalez, Davisson, Coleman, Seimer, and
3 Gillespie's Motions to Join (ECF Nos. 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 540,
4 541, 543, 545, 547) are GRANTED.

5 IT IS FURTHER ORDERED that Lopez's Motion for Production of Discovery (ECF No.
6 527) is DENIED.

7 DATED: April 9, 2018

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11 C.W. Hoffman, Jr.
12 United States Magistrate Judge
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